Civil Rights in a Time of Fear:
Reflecting on the Lessons of the Gouzenko Spy Trials

The fears we cannot climb become our walls.
Noah Ben Shea, *Jacob the Baker*, 1989

1. INTRODUCTION

Although we tend to think of civil and human rights as immutable and even sacrosanct, the history of such rights demonstrate that, sadly, the opposite is sometimes true. These rights are public declarations of what a nation believes and cherishes, the moral and ethical framework of a society, but civil rights, in reality, are only protected when we, as a society, decide they are protected. Fear, be it of espionage, or war, or terrorism, can compel us, individually, and as a community, to do things that, in ordinary circumstances, we would never find acceptable. Absolutes become flexible. Examples, in the long shadow of the terrorist attacks of 11 September 2001 on the United States, are easy to find: suspected terrorists are held indefinitely, secret tribunals adjudicate security risks and personal data on everyone is collected. Torture has even been justified, albeit as a last resort. Politicians enact such measures because we let them, because we are all afraid, because draconian measures, in a climate of fear, are what we believe we need.

Yet, ironically, even as we demand such measures from our politicians, we simultaneously expect that courts will protect and uphold the very civil rights under threat. We expect judges to resist demagoguery, hysteria, and fear, and coolly and dispassionately dispense justice. But courts are staffed with living, breathing human beings, not legal automatons, and these judges can, just as easily, be caught up in the polemic that national security trumps civil rights in times of fear. We have discovered, again and again, that courts and judges are not

immune to public pressure and have been far too deferential to public demands for security. When the dust settles, we realise, red-faced, that we went too far and relearn that courts are imperfect defenders of civil rights because we structured the system that way. This is why we must pause, today, when reassured by politicians contemplating far-reaching security measures.

In the post 9/11 world, where such measures have been passed and where we hear our political leaders assuage our concerns about anti-terrorism legislation going to far, it is useful to reflect on the lessons of the Royal Commission on Espionage and the Canadian communist spy trials that took place in the year following the end of World War II. A group of Canadians, some filled with naively passionate beliefs that their actions were serving a greater good, leaked official secrets to the U.S.S.R during World War II. They were only discovered when a Soviet embassy staffer defected in 1945. These accused spies were rounded up, isolated and forced to testify before a secret Royal Commission headed by two Supreme Court judges, almost always without the aid of legal counsel, and then, subsequently, they had their testimony used against them when they were prosecuted under the *Official Secrets Act.*[1]

The two judges of the Supreme Court of Canada, acting as secret Royal Commissioners, badgered witnesses, obfuscated, abandoned even the pretence of impartiality and failed to act to inform witnesses of even their most basic of rights all the while refusing to allow legal representation. They were caught up in a climate of panic and fear that would eerily foreshadow the McCarthy spy trials in the United States. By examining the Royal Commission and its report, and the subsequent criminal prosecutions of those forced to testify before it, this paper seeks to demonstrate that even the weightiest of judges can violate the spirit of civil rights in a climate of fear and national security. This suggests that any security legislation, like the federal *Anti-Terrorism Act* of 2001, must be carefully constructed to balance the needs of security and civil

[1] S.C. 1939, c. 49.

rights. For, if it could happen then, it can happen again.

2. THE RUSSIAN SPY RING

Communism, leading up to World War II received "on again – off again" government attention. Counter-intelligence, such as it was, fell to the Royal Canadian Mounted Police, who were really only interested in Communism if it effected the labour situation in Canada. The Communist Party was first banned by the Conservative government of R. B. Bennett in the early 1930s, but the restrictions were lifted by the King government when the Liberals returned to power. The party was again scrutinised after Hitler and Stalin agreed to the Nazi-Soviet Non-Aggression pact and, as a result, the party's literature was first censored and the party itself banned in June 1940.[2] The party went underground. Members were interned, ironically, with their Fascist opponents. At the same time, Canada was becoming an important venue for spying, given the country's growing sophistication in technical and scientific matters, especially after the creation of the National Research Council and its atomic research. By the end of the war, the country was also a significant military power, with an armed force of about one million people and the fourth largest navy in the world. The growing foreign diplomatic corps in Ottawa also served as a convenient cover for foreign intelligence gathering.[3]

Prior to World War II, Canada and the Union of Soviet Socialist Republics had no formal diplomatic contact. Relations only worsened after the adoption of the Soviet-Nazi Non-Aggression Pact. Everything changed, however, when, in June 1941, Hitler – in one of his greatest debacles – ordered the German Army to invade the U.S.S.R. Canadian public perceptions altered as the casualties mounted into the millions; the Soviet people became victims

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[2]Robert Bothwell & J. L. Granatstein, eds., *The Gouzenko Transcripts: The Evidence Presented to the Kellock-Taschereau Royal Commision of 1946* (Ottawa: Deneau Publishers, n.d.) at 4.

[3]For an introduction to the history of spying in Canada see Graeme S. Mount, *Canada's Enemies: Spies and Spying in the Peaceable Kingdom* (Toronto: Dundurn Press, 1993).

and Communism was no longer quite so evil in the minds of Canadians. The action also made the Soviet Union an ally of Canada in the fight against the Nazis. Both countries agreed on establishing diplomatic relations in June of 1942 and embassies were established.[4] By 1945, the Soviet embassy included seventeen diplomats and employed approximately twenty Canadians.[5] Restrictions were also relaxed, which allowed Canadian Communists to form the Labour-Progressive Party. The party garnered two percent of the national vote in the 1943 federal election, and Fred Rose, the party leader, was elected to the House of Commons for the riding of Montréal-Cartier. He was subsequently re-elected in 1945.[6] What Canada did not know was that the newly established Soviet Embassy was going to be used as a base from which the U.S.S.R. could spy on Canada through parallel intelligence gathering organisations: the N.K.V.D. (the Soviet Union's secret police and predecessor to the K.G.B.), the G.R.U. (Military Intelligence), the Naval Service, the Commercial Service and the Diplomatic Service.[7] These spying activities were exposed when Lieutenant Igor Gouzenko, a 26 year old Soviet Cypher clerk in the Embassy in Ottawa, decided to defect.

Gouzenko was born in the village of Rogochen, near Moscow, in 1919. He trained as an architect but, after being investigated by the N.K.V.D., he was sent to a secret school to be trained in encryption. He came to Canada, after a fictitious biography had been created, in June 1943, and travelled from Moscow to Fairbanks and then to Edmonton by airplane and from Edmonton to Ottawa by train. Gouzenko's wife Svetlana and his two-year-old son joined him later; their daughter was born in Canada. Once at the Embassy, Gouzenko was responsible for

[4]Bothwell & Granatstein, *supra* note 2 at 6.

[5]J. L. Granatstein & David Stafford, *Spy Wars: Espionage and Canada from Gouzenko to Glasnost* (Toronto: Key Porter Books, 1990) at 52.

[6]Canada, *Report of the Royal Commission Appointed under Order in Council P.C. 411 of February 5, 1946 to Investigate the Fact Relating to and the Circumstances Surrounding the Communication, by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (Ottawa: King's Printer, 1946) at 111 [hereinafter *The Royal Commission on Espionage*].

[7]*Ibid*., 19.

encoding and deciphering telegraphic and postal transmission between Moscow and the embassy for the N.K.V.D.[8]

Gouzenko's motivations for defecting are not clear but it appears that he was driven by material reasons and not ideology. He had never been a devoted communist. His R.C.M.P. handler claimed: "I believe honestly it was food and not politics that motivated him to defect. He wanted to eat regularly. You can't blame him for that. But his motive wasn't to try and help Canada."[9] Testifying before the Commission, Gouzenko sounded more high-minded:

> Convinced that such double-faced politics of the Soviet government towards the democratic countries do not conform with the interests of the Russian people and endanger the security of civilisation, I decided to break away from the Soviet regime and to announce my decision openly.[10]

He claimed, in his biography, published in 1948, that, "I did my duty toward the millions enslaved and voiceless in Russia today."[11] Regardless of his reason, he had to act quickly; his time in the country was limited. Initially, Gouzenko received instructions to return to Moscow in late 1944; it was repeated in May 1945 and, in July 1945. His replacement arrived but Gouzenko's superiors at the Embassy continued to delay on the pretext of finding transportation.[12] Gouzenko also realised the best way to defect was to bring something with him so he left the Embassy at 8:30 pm on 5 September 1945 with 109 secret documents under his shirt that detailed an extensive spy ring operating in Canada.

Gouzenko's defection, despite the seriousness of the affair, began to take on the air of a comedy of errors. He first went to the offices of the *Ottawa Journal*. Later, Gouzenko would claim they sent him away but Chester Frowde, at the *Journal*, told a different story. Gouzenko

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[8]Testimony of Igor Gouzenko, Bothwell & Granatstein, supra note 2 at 25-39.
[9]Don Fast, *Gouzenko: The Untold Story*, ed. John Sawatsky (Toronto: Macmillan-Gage, 1984) at 1.
[10]Testimony of Igor Gouzenko, Bothwell & Granatstein, *supra* note 2 at 126.
[11]Igor Gouzenko, *This Was My Choice: Gouzenko's Story* (Toronto: J. M. Dent & Co., 1948) at 322.
[12]Testimony of Igor Gouzenko, Bothwell & Granatstein, *supra* note 2 at 39.

was "white as a sheet" and difficult to understand. His only statement was, "Its war. Its war. Its Russia."[13] He then went to the Ministry of Justice but, by this point, no one was in the office. He returned to his apartment. The next day, he returned to the *Ottawa Journal* but the reporter, who did not believe him since he appeared to be paranoid, agitated and delusional, urged him to go to the R.C.M.P. Again, he went to the Justice Ministry in the hopes of speaking to Minister Louis St. Laurent but was also turned away. He ended up in the offices of a secretary at the Crown Attorney's office. She believed him and made repeated attempts to find someone in authority to help. She called the Prime Minister's private secretary who urged her to get ride of him. Finally she got an interview for him the next morning with an Inspector Leopold of the R.C.M.P.

Gouzenko returned home again but was fearful for his life and the life of his wife and children so he stayed with a neighbour. The neighbour called the police but they did not know what to do and left. Then, Soviet embassy officials showed up looking for Gouzenko; they broke down the door and searched the apartment. The Ottawa Police again returned and the embassy officials left after leaving their names. At a loss, the Ottawa Police looked to the R.C.M.P. who contacted Norman Robertson, Undersecretary of State for External Affairs. It was Robertson, who finally ordered that Gouzenko be taken into custody on the advice of his friend Sir William Stephenson (the man better known by his codename, Intrepid) of British Intelligence. Stephenson, serendipitously, happened to be in Ottawa at the time. Gouzenko was first hidden by the R.C.M.P. outside Ottawa for a short time and then was moved to Camp X in Oshawa, which, ironically, had been used during the war to train spies.[14]

The documents Gouzenko smuggled out of the Embassy pointed to spies throughout the

[13]Interview with Chester Frowde, in Sawatsky, *supra* note 9 at 22.
[14]Testimony of Igor Gouzenko, Bothwell & Granatstein, *supra* note 2 at 131-134.

Ottawa bureaucracy, in the British High Commission in Ottawa and in the United States. Prime Minister King, of course, alerted London and Washington personally. While this was going on, Canadian diplomats in Ottawa were playing a game of feigned ignorance with representatives from the Soviet Embassy. On 8 September 1945, the Soviets requested that Ottawa assist the Embassy by searching for and arresting Gouzenko; they claimed he had stolen money from the Embassy and then fled. Norman Robertson responded and asked for particulars; Canada agreed to make inquires. On 11 September, the Embassy provided the Department of External Affairs with physical descriptions of Igor Gouzenko and his wife Svetlana. The same day, Robertson responded to the Embassy claiming that Canadian police had no authority to arrest Gouzenko and risked civil action if an arrest took place. In what can only be described as a veiled threat, Robertson goes on to describe that the doctrine of *habeas corpus* would result in a complete inquiry into the circumstances if Gouzenko was arrested and turned over to the Soviets.[15]

3. THE ROYAL COMMISSION

Canada, Britain and the United States agreed to move in concert against the spies given its grave significance by 25 November 1945 but, by the time the deadline had been reached, the United States was not yet prepared to act. In Canada, the RCMP kept the spies under constant surveillance. Otherwise, nothing happened.[16] Drew Pearson, an American journalist, who had been given one of the great scoops of the century, leaked the Gouzenko affair on 5 February 1946. It may have been Stephenson who leaked the story or, perhaps, Americans determined to undermine American-Soviet relations. Regardless, the revelation forced Ottawa to act. The next day, King informed his cabinet which passed Order-in-Council P.C. 411,[17] which created the

[15]Testimony of Laurent Beaudry, Chief of the Diplomatic Division of the Department of External Affairs, Bothwell & Granatstein, *supra* note 2 at 149-153.
[16]Granatstein & Stafford, *supra* note 3 at 59.
[17]For a copy of the Order in Council see the *Royal Commission on Espionage, supra* note 6 at 7.

Royal Commission on Espionage and appointed Supreme Court Justices Robert Taschereau and R. L. Kellock as Commissioners.

Kellock had been a leading lawyer in Ontario before being named to the Supreme Court and Taschereau had been a professor at Laval University. The Commissioners appointed E. K. Williams, President of the Canadian Bar Association and later Chief Justice of Manitoba, Gerald Fauteux, who was said to be one of the best criminal lawyers in Canada, as well as David Mundell as Commission lawyers.[18] The Order-in-Council authorised the Commissioners to conduct an investigation into any public officials that may have transmitted information to foreign governments. Significantly, they were also authorised to "adopt such procedure and method as they deem expedient for the conduct of such inquiry and may alter or change the same from time to time."[19]

The Commission was also to have the full powers granted under the *Inquiries Act*, which included, under section four, the power of "summoning before them any witnesses, and of requiring them to give evidence on oath or on solemn affirmation...and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters..."[20] Section five of the statute gave the Commissioners the power to enforce the attendance of witnesses and to compel them to give evidence.[21]

The Supreme Court Justices began reviewing evidence on 6 February 1946 and Gouzenko began testifying in secret on the 13th and finished on the 14th (although he was briefly recalled on 3 May 1946 and on 17 May 1946). By this point, the Commissioners felt confident enough to recommend the arrest of twelve accused spies that Gouzenko was able to

[18]Sawatsky, *supra* note 9 at 76.
[19]*Royal Commission on Espionage*, *supra* note 6 at 8.
[20]R.S.C, 1927, c. 99 s.4.
[21]*Ibid*., s. 5.

identify on the advice of Williams as counsel for the Commission. Commissioner Taschereau declared:

> The reasons which impel us to accept your advice are the extremely serious nature of the disclosures so far made and indicated by the evidence and also the fact that cover names of persons who have not so far been identified also appear in the evidence and indicate that the full extent of the ramifications of the disloyal practices and the persons engaged therein may be even greater than is already known and may be continuing. The matter appears to be so serious from the national standpoint that Mr. Commissioner Kellock and myself believe that the course you advise should be pursued in these exceptional circumstances.[22]

Clearly, the Commissioners were worried and this fear would no doubt drive later decisions made by the Commissioners and their lawyers. As a result of William's recommendation, the accused spies were arrested pursuant to Order-in-Council 6444, dated 6 October 1945[23], which had authorised the Minister of Justice or the Acting Prime Minister to make an order to interrogate or detain any person in any place and under such conditions that the Minister might consider appropriate. Persons arrested under the order-in-council could be detained until such time as the person was no longer a threat to national security. The R.C.M.P. was also authorised to enter the premises of any person detained under the order-in-council at any time, search it, and seize anything found or detain any person found therein so long as the RCMP has reasonable grounds to believe that the detained person or seized article was evidence that secret and confidential information has been communicated to agents of a foreign power.[24]

These sweeping powers had been authorised under the *War Measures Act,*[25] which gave virtually unlimited power to the Governor-in-Council (the federal cabinet) in an emergency such as war. Under the statute, the Governor-in-Council "may do and authorise such acts and things, and make from time to time such orders and regulation, as he may by reason of the existence of

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[22]Bothwell & Granatstein, *supra* note 2 at 71.
[23]For a copy of the Order in Council see *Royal Commission on Espionage*, *supra* note 6 at 649.
[24]*Ibid*., 7.
[25]S.C. 1914, c. 2.

real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace order and welfare of Canada."[26] The subsequent *National Emergency Transitional Powers Act*,[27] adopted in December 1945, continued in force all existing regulations adopted under the *War Measures Act*.

Exercising these powers of detention, the R.C.M.P., at 7:00 am on 15 February, swooped down simultaneously on the individuals that Gouzenko had been able to identify. They were taken to a R.C.M.P. station outside of Ottawa and each person, under twenty-four hour armed guard, was placed in an empty barrack where the burning lights were never turned off.[28] The family of one detainee did not know where he was for ten days.[29]

The Royal Commission continued to hear evidence in secret almost continuously until 18 April and then sat, as witnesses were available, until 27 June 1946. They heard from 116 witnesses and studied about 1000 exhibits that were filed. Transcripts of evidence ran to 6000 pages.[30] The Royal Commission submitted its first interim report to the Governor-in-Council on 2 March 1946. It laid out the general story of what took place in the Embassy and identified Emma Woikin, a cypher clerk with the Department of External Affairs, Captain Gordon Lunan, of the Wartime Information Board (Canadian Information Service), Edward Mazerall, an electrical engineer in the National Research Council working on radar, and Kathleen Willsher, an employee of the British High Commission as having communicated confidential information to agents of a foreign power.[31] The Royal Commission's second interim report was presented on 14 March 1946 and made public on 15 March 1946. This report identified Dr. Raymond Boyer

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[26]*Ibid*., at, s 3(1).
[27]S.C., 1945, c. 25.
[28]Sawatsky, supra note 9 at 77-78
[29]*Ibid*., 79.
[30]*Royal Commission on Espionage, supra* note 6 at 9.
[31]*Ibid*., at 693-695.

of McGill University and an expert in an explosive called R.D.X., Harold Samuel Gerson, an employee of the Department of Munitions and Supply and subsequently an employee of the War Assets Corporation, Squadron Leader Matt Simons Nightingale who was with the R.C.A.F.'s Branch Land Lines, Technical Section, and Dr. David Shugar, of McGill University and Lieutenant in the Directorate of Electrical Supply for the Navy.[32]

The third interim report was submitted and made public on 29 March 1946. It identified Eric Adams who worked with the Wartime Requirements Board, the Foreign Exchange Control Board, the Bank of Canada, and the Industrial Development Bank, Israel Halperin who served in the Army's Directorate of Artillery, Dunford Smith who worked in the microwave section of the Radio Branch of the National Research Council, J. S. Benning who worked in the Department of Munitions and Supply in the Ammunition Production Branch and Squadron Leader F. W. Poland who served as an administrative intelligence officer with the R.C.A.F.'s Directorate of Intelligence and was executive secretary for the Psychological Warfare Committee.[33] The final report was presented on the 27 June 1946 and ran to 733 pages including appendices and copies of the three interim reports.

What follows are the individual stories of some of the accused spies in this case, their treatment before the secret Commission, and the outcome of their criminal prosecutions and appeals, where known. These stories show the unfair treatment they suffered at the hands some of the weightiest judges and lawyers in the country, and demonstrate that panicked officials quickly forget standards of fairness and civil rights in a time of crisis. And then, to add insult to injury, Ontario judges and appellate courts in many cases, upheld these actions after the fact.

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[32] *Ibid*., at 697-701.
[33] *Ibid*., at 705-712.

4. THE STORY OF SOME OF THE ACCUSED

A) EMMA WOIKIN

Emma Woikin was called before the Commission on 22 & 28 February 1946. She had been born in 1921 in Blaine Lake, Saskatchewan of Doukhobor parents who had immigrated to Canada around 1899. In the spring of 1944, she began working for the Ministry of External Affairs' Cipher Division and, unfortunately, in May of 1945, had agreed to supply information to the Soviets. Although she did receive a one-time gift of $50, her motivation came from sympathy to the Soviet Union. In her testimony to the Commission, however, she was unable to explain her reasons any better than that. Her interest came from a concern for "the poor or something." She had never been a member of the Communist party and had never had any interest in joining. She also admitted that in January of 1946 she had applied for Soviet citizenship and wanted to live in Russia.[34]

It was only at the conclusion of her testimony that she was told the purpose of the Commission by Commissioner Taschereau and that, pursuant to the *Inquiries Act*, any person who faced charges would be allowed to be represented by counsel and that no person shall be reported without reasonable notice of any charge and shall be allowed an opportunity to be heard in person or by counsel. Taschereau went on to declare:

> We are of the opinion that the evidence produced before us will require us to report that you, a person in position of trust or otherwise, have communicated directly or indirectly secret and confidential information, the disclosure of which might be inimical to the safety and interests of Canada, to the agents of a foreign power....Should the proper authorities see fit you may be charged in the courts, where you will have the opportunity to be represented by counsel...We know further advise you that if you wish to say anything else, or to adduce further evidence, or if you wish to have counsel appear before us on your behalf, you are so entitled.

Woikin then testified that she had nothing further to add and did not wish to have counsel appear

[34]Testimony of Emma Woikin, Bothwell & Granatstein, *supra* note 2 at 156-165.

on her behalf.[35] She readily complied with the Commission and did not attempt to protect her interests by requesting legal counsel or refusing to answer questions. She was found guilty of retaining official documents that were prejudicial to the safety or interests of the nation and for allowing these documents to be possessed by any other person not authorised contrary to the *Official Secrets Act*. Woikin, upon her conviction, sought to have a fine imposed in lieu of imprisonment. The court found that Woikin was an educated woman who had been brought to Ottawa and given a good opportunity. She had taken the oath of secrecy and yet violated it deliberately. In the interest of justice, and because consequences may have flown from the release of the information, Woikin was sentenced to two years and six months for each charge, served concurrently in Kingston.[36]

B) EDWARD MAZERALL

Edward Mazerall was next to appear before the Commission; he was sworn 27 February 1946. In 1942, he had joined the Air Force Section, Radio Research and Development Branch of the National Research Council. He was also part of a Marxist study group that included Dunford Smith, David Shugar, and Gordon Lunan but never considered himself a Communist. When asked why he supplied information he answered: "I felt that they stood first and foremost for peace."[37] The Royal Commission asserted that he provided information about radar developments through David Lunan to the Soviet Embassy.[38]

Mazerall was convicted by a jury for conspiring with David Lunan and Israel Halperin to pass secret information to the Soviet Embassy. On appeal, Robertson C.J.O rejected the

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[35]*Ibid*., 167.
[36]*R.* v. *Woikin* (1946), 1 C.R. 224 (Ont. Co. Ct.) at 224-225.
[37]Testimony of Edward Mazerall, Bothwell & Granatstein, *supra* note 2 at 187-199.
[38]*Royal Commission on Espionage, supra* note 6 at 696.

argument that the Royal Commission has lost its authority to examine Mazerall. While the circumstances of his detention (that he was brought to the Commission in the custody of the police and not under subpoena) may affect the value given to his testimony it did not affect the right of the Commission to examine him. He was not held in detention under the authority of the Commission and they did not have the authority to release him.

The more significant aspect of the appeal dealt with the question of whether the confession was given voluntarily. There was a burden on the Crown to establish that the confession was voluntary and, if it could not be established, then the admission could not be admitted into evidence. A *prima facie* presumption that the accused may have been influenced by fear or some other factor to say something untrue existed. However, counsel for Mazerall was unable to establish precedent for excluding evidence made elsewhere under oath. In fact, precedent suggested that involuntary admissions given before Parliament, Bankruptcy Court, and depositions made before fire commissioners could be used in criminal proceedings.[39]

He was required to answer and did not raise an objection about the testimony being used against him. At his trial, Mazerall also swore the information was true. Counsel's assertion that Mazerall had been influenced by a R.C.M.P. constable to not use his privilege by confessing in the hopes that the Commission would be more lenient was dismissed for lack of evidence. The court did not think it necessary to discuss the appropriateness of the government's action in detaining Mazerall. Robertson C.J.O said: "It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true." The appeal was dismissed.[40]

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[39] The cases cited were ancient: *R.* v. *Merceron* (1818), 2 Stark. 366, 171 E.R. 675 (evidence before Parliament), *R.* v. *Scott* (1856), Dears. & B. 47, 169 E.R. 909, 7 Cox C.C. 164 (evidence before the Bankruptcy Court) and *R*. v. *Coote* (1873), L.R. 4 C.P. 599, C.R. [6] A.C. 282 (evidence before fire commissioners).

[40] *R.* v. *Mazerall*, [1946] 4. D.L.R. 336, 86 C.C.C. 137.

C) CAPTAIN DAVID LUNAN

David Lunan was called before the Royal Commission and sworn on 28 February 1946. He had joined the Canadian Army in 1943 and served on the Wartime Information Board as he had, in civilian life, worked in advertising. He asserted that his spying was not for economic gain and insisted his actions were not traitorous: "I did not go there with any fixed and firm loyalty to the Russians. I went there very much as a Canadian who was acknowledgedly a Communist in sympathy and a well-wisher for the Soviet Union."[41] The Royal Commission claimed that Lunan served as an intermediary between those who had the information and the Soviet Embassy.[42]

He was subsequently charged for violating the *Official Secrets Act* and, specifically, that he conspired with Isreal Halperin, Edward Mazerall and Dunford Smith to breach provisions of the *Official Secrets Act*; he was found guilty at trial. Counsel for Lunan appealed, *inter alia*, on the basis that the documents provided by Gouzenko and used against him were the property of the Embassy and improperly removed by Gouzenko and therefore were protected by the doctrine of diplomatic immunity.[43]

Lunan's counsel asserted that international law did not allow these diplomatic documents to be used as evidence. In essence, diplomatic immunity protects a diplomat from being arrested on a criminal charge except where the diplomat jeopardises the safety and welfare of the state in which the diplomat resides. As the court noted, while the principle of diplomatic immunity is well established there was no case law to support Lunan's claim that the evidence could be excluded based on diplomatic immunity and, regardless, Lunan had no status to claim to the

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[41]Testimony of David Lunan, Bothwell & Granatstein, *supra* note 2 at 203-230.

[42]*Royal Commission on Espionage, supra* note 6 at 695.

[43]Lunan also appealed on the basis that there had been an improper trail election, that the evidence of Gouzenko at the Royal Commission on Espionage was irrelevant and that the judge had refused to direct and issue to *voir dire* before admitting the evidence but these issues were quickly dismissed by the Court of Appeal.

protection. Furthermore, the Soviet Embassy did not object to the use of the documents. The Court also dealt with the use of Lunan's testimony before the Commission being used in his criminal trial. The *Canada Evidence Act*[44] required Lunan to answer the questions put to him regardless of whether it would incriminate himself or not. Lunan should have objected to the use of his testimony in order to prevent its subsequent use and, since Lunan did not object to answering the questions, his sworn testimony before the Commission was therefore admissible.[45] Of course, Lunan was not given access to counsel nor advised that he needed to raise that objection.

The conviction was upheld and Lunan was sentenced to five years imprisonment at Kingston Penitentiary. He was next called on 20 November 1946 under subpoena to testify in the trial of Israel Halperin. Lunan refused to take the oath as a witness and was found in contempt of Court. The county court judge imposed an extra year on his sentence. Lunan's counsel brought an *ex parte* application for a writ of *habeas corpus* subsequent to the completion of his original five-year sentence. The application was refused since the Judge had no jurisdiction to review the judgement of the county court judge and, regardless, it had been done within the judge's authority.[46]

D) DR. RAYMOND BOYER

Dr. Raymond Boyer was called before the Royal Commission on 7 March 1946. He was never a member of the Communist Party but did give financial support including $50 for Fred Rose's election campaign.[47] He admitted transmitting information while under oath not to do so, based on his communist sympathies. He believed "that there should be a full exchange of

[44]R.S.C. 1927, c. 59.
[45]*R.* v. *Lunan*, [1947] 3 D.L.R. 710, 88 C.C.C. 191.
[46]*Ex Parte Lunan*, [1951] O.R. 257-262.
[47]Testimony of Dr. Raymond Boyer, Bothwell & Granatstein, *supra* note 2 at 245-247.

information between Russia and Canada and the United States and England."[48] After a recess, Kellock discussed the powers of the Commission and Boyer's rights. As in the earlier cases, only after these damning statements were made did the Commissioners inform Boyer of these rights. If the Commission concluded that there was misconduct on Boyer's part then Boyer would be allowed legal counsel and be allowed to present any explanations or statements he wished. No report could be made against him without doing so. Kellock stated:

> On the evidence, and in view of your own evidence, it will be difficult for us to come to any other conclusion than that we are of the opinion that we must report that you have communicated secret information to the agents of a foreign power, the disclosure of which might be or may have been inimical to the interests of Canada.

He went on to ask if Boyer had any statement he wished to make or if he wished to have counsel appear on his behalf. Kellock emphasised that the Commission was only a fact-finding body and not a court. Charges were only within the purview of the Governor-in-Council. Boyer concluded saying, "No I have told you everything there is."[49] The Royal Commission, in their report, accused Boyer of transmitting full information on a highly secret explosive called R.D.X. to the Soviets.[50]

Boyer was convicted at trial but subsequently appealed. The Court held that the Gouzenko documents were admissible, statements made at the Royal Commission were admissible so long as the accused made no objection, the accused's oath of secrecy did not affect the testimony's admissibility, and having the same trial judge preside over two trials of the accused was not sufficient to constitute grounds for appeal.[51] Boyer appealed to the Supreme Court of Canada since a new provision of the *Criminal Code* enacted in 1948 allowed appeals to

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[48] *Ibid*., at 268.
[49] *Ibid*., 269.
[50] *Royal Commission on Espionage, supra* note 6 at 697.
[51] *R.* v. *Boyer* [1949] C.C.S 748, 94 C.C.C. 195. (Que. C.A.)

the Supreme Court of Canada; Rinfret C.J.C heard it in chambers. The new right of appeal was based on raising a question of law; it was no longer required to show conflict between two courts but Rinfret C.J.C held that legislation granting a new form of appeal must be applied prospectively.[52]

E) H. S. GERSON

Harold Gerson, when he appeared before the Commission on 12 March 1946, simply denied everything. He denied having conversations with Fred Rose about providing information and denied that he supplied information from the Production Branch of the Department of Munitions and Supply to the Soviets. The Commission called an Inspector Harvison of the R.C.M.P. who testified that Gerson told him he would not be able to "live with himself" if he identified others involved in the Soviet espionage ring.

Gerson was recalled and informed that he had a duty to disclose all information. Gerson asserted that he had no names to give. Commissioner Taschereau said, "So will you please tell us what are the names of these persons; and I am suggesting to you that you are obliged to answer here?" Gerson answered, "Well, I don't know of any names." Taschereau, a few moments later, declared: "Oh, no, sir; speak the truth. You certainly have names."[53] Despite Gerson's resistance, the Royal Commission accused him of communicating information relating to the Department of Munitions over a considerable period of time; one item of correspondence amounted to one hundred and fifty pages.[54]

Gerson was charged for being involved in a conspiracy along with Scot Benning, Eric Adams, Frederick Poland and Matt Nightingale to provide information to the Soviet Union

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[52]*Boyer* v. *The King* [1949] S.C.R. 89, 4 D.L.R. 469.
[53]Testimony of H. S. Gerson, Bothwell & Granatstein, *supra* note 2 at 280-281.
[54]*Royal Commission on Espionage, supra* note 6 at 698-699.

contrary to the *Official Secrets Act* and the *Criminal Code*. He was convicted on 11 October 1946. Counsel for Gerson appealed on a number of matters: that the evidence before the Royal Commission was inadmissible and sought to distinguish Gerson's case from that of *R*. v. *Mazerall, supra*. Counsel asserted that Gerson was already facing charges within the meaning of the *Inquiries Act,* which required that persons facing charges be allowed access to counsel. Aylesworth J, for the Court of Appeal, did not agree that the Commission had made out a charge against Gerson. The judge also disposed of the matter of the improper admission of the embassy documents by quickly referring to *R.* v. *Lunan*. A question of a misdirection given by the trial judge in his charge to the jury was also quickly dismissed.

The remainder of the case hinged on the fact that the Crown had presented a new indictment including a number of new co-conspirators some four months after Gerson's grand jury found a true bill against him. A second grand jury also found a true bill. Counsel for Gerson sought to discover who "other persons unknown" were by serving a demand for particulars to the Crown. The Crown then moved to amend the indictment to include several more names. Aylesworth J found that the trial judge has usurped the role of the grand jury when he ordered the amendment to the indictment. The amendments were substantive and the Crown, in the trial, made numerous references to the added individuals. There was, therefore no trial at law since the amendment vitiated the indictment. The appeal was allowed and the conviction quashed.[55]

Gerson, and another alleged co-consiprator, Matt Nightingale, were later called to give evidence in similar cases deriving from the alleged conspiracy but they refused to be sworn fearing that they would incriminate themselves even though the *Canada Evidence Act* required that they answer. Both were found to be in contempt of court and sentenced to three months in

[55]*R*. v. *Gerson*, [1949] 3 D. L. R. 280, 4 C.R. 233, 89 C.C.C. 138.

jail pursuant to common law. Gerson and Nightingale appealed to the Chief Justice of the Supreme Court for writs of *habeas corpus*. The petitions were heard in chambers. Rinfret C.J. held that superior courts of justice has inherent jurisdiction to punish for contempt of court and there was no conflict with statutes dealing with disciplinary matters.[56] Gerson appealed the decision of the Chief Justice and was heard by Kerwin, Hudson, Rand and Estey, JJ but the appeal was dismissed.[57]

F) ERIC ADAMS

Like Gerson, Eric Adams refused to assist the Commission when he was called before it on 15 March 1946. His testimony consisted mostly of discussions with the Commissioners about the status of the Commission and his legal rights. Adams swore to tell the truth but he refused when the secrecy oath was read. In response, he asked, "Does that mean I have to answer questions without legal counsel?" Taschereau answered, "We will let you know; we will give you the necessary information about that, Mr. Adams."[58] After a testy exchange with the Commissioners, he finally took the oath when reassured that he could discuss the matters freely when he was finally able to speak to counsel. The exasperation of the Commissioners was clearly evident; they did not like being challenged.

Adams did answer a series of biographical questions but then stated that while being interrogated by the R.C.M.P. he found that their file on him was full of mistakes and so refused to answer any more questions. Kellock informed Adams that, "You do not need to know the purpose, Mr. Adams. All you have to do is answer the questions." After this, Adams refused to answer any more questions without legal counsel. Kellock then told Adams, "We have the discretion at this point as to whether you shall have counsel or not, and for my part I decided that there was no occasion for you to have counsel at the present time. If any charges arise against

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[56]*In re Harold Samuel Gerson* (*sub nom In re Matt Simmons Nightingale*), [1946] S.C.R. 538, [1946] C.C.S. 251
[57]*Re Gerson*, [1946] S.C.R. 547.
[58]Testimony of Eric Adams, Bothwell & Granatstein, *supra* note 2 at 287.

you at some stage, then you will be given that opportunity. Commission Lawyer Gerald Fauteux then asked Adams about thirteen questions. Adams answered every one with, "No comment."[59]

The Royal Commission claimed that Adams provided information on munitions supplied to England, notes from conferences, correspondence with companies and about contracts and enquiries related to his civil service post.[60] Adams was then charged with conspiracy to breach the *Official Secrets Act*. His counsel first sought a change of venue alleging that "the findings of the Royal Commission received wide publicity in the county of Carleton [Ottawa]..."[61] Adam's counsel was not successful in showing the court that an impartial trial could not be held in the county of Carleton since counsel relied only on the widespread publicity that was garnered by the Royal Commission's reports. McRuer J stated: "I doubt very much whether jurymen ultimately summonsed to try this case will, at the time when the case comes on for trial, remember much, if anything that they have read in the press as applicable to this individual accused."[62] The application was dismissed.

G) DURNFORD SMITH

Durnford Smith was called before the Royal Commission on 19 March 1946 but refused to take the oath until he had an opportunity to speak to his legal counsel. He felt it was not fair to be made to testify without legal advice. Kellock responded, "It does not matter what your feeling is..." Smith responded:

> Well, my lord, I feel it is a question of principle. I have been held thirty-two days. I am not a lawyer and I do not know the technicalities of the law. I am not refusing to give testimony but I do wish to see Mr. Aylen [Smith's lawyer] before I am questioned.

He agreed only after being told he would be listened to after being sworn. Smith and Kellock continued the exchange about legal counsel. Kellock informed him: "we [the Commissioners]

[59] *Ibid.,* at 290-291.
[60] *Royal Commission on Espionage, supra* note 6 at 706.
[61] *R.* v. *Adams,* [1946] O.R. 506-510, at para. 3.
[62] *Ibid*., at para. 14.

have a discretion as to whether we shall allow or shall not allow counsel, up to the point when any charge is made against you..." Smith felt that "what is actually happening is that I am being questioned by a prosecution, without the advantage of legal advice."[63]

The Commissioners finally relented and allowed legal counsel to be present for him. The examination continued but both sides were angry. Kellock asked, "I don't know why you spar so much, Mr. Smith." The Commissioner, later, went much further:

> I do not think it is doing your position any good at all; in fact rather the contrary, to my way of thinking. All right; I wanted to understand that from you. Now I want to understand this also from you, if I can. Some of the witnesses that we have had, whose names have been referred to during your examination, have been a good deal more frank with the Commission than I think you have. My impression at the moment, to use your expression, is that you have not been completely frank, and that you are in a position to say a good deal more if you will.[64]

The Royal Commission accused Smith, in their report of having provided information to the Soviets relating to the Radio Branch and had handed over about ten books and reports on radio.[65]

Smith was convicted on 27 December 1946, due in large measure to the previous testimony of Mazerall, who had not demanded counsel before testifying at the Commission. As a result, Smith was sentenced to five years imprisonment but appealed. Aylesworth J.A., for the appellate court, rejected the argument that the Attorney General of Canada had not given adequate consent to the prosecution as required under the *Official Secrets Act* as the Crown had closed its case without providing evidence of that consent. The court was also not willing to overturn the decision of the trial judge who accepted as true the testimony of Mazerall, his accomplice, despite the danger of using uncorroborated accomplice testimony. The court also rejected the submission of Smith's counsel that there was insufficient proof of a conspiracy since

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[63]Testimony of Durnford Smith, Bothwell & Granatstein, *supra* note 2 at 292-293.
[64]*Ibid*., at 310.
[65]*Royal Commission on Espionage, supra* note 6 at 708.

there was:

> …the conversation between the appellant [Smith] and Mazerall [his co-conspirator], the existence in the Russian Embassy of data, in the handwriting of appellant, pertaining to the organisation and work of the National Research Council, the unsatisfactory nature of appellant's explanation as to why he prepared certain of the documents referred to, the correspondence in time between the period of appellant's possession of a large number of secret documents withdrawn by him from the library of the Research Council and the period within which photostatic copies of these documents, or copies of them, were said to have been made in the Russian Embassy, the fact that one document so obtained from the library had nothing to do with appellant's work and yet the document mentioned in the papers brought from the Embassy as having been photographed there...[66]

As the testimony above made clear, Smith clearly asked for legal counsel; in the appeal, Smith's counsel argued that his objection was really two objections: one for legal representation and the other that his evidence would not be used to incriminate him and thereby prevent its use in his subsequent trial. The court rejected this argument as well since he answered the questions put to him once his solicitor was present without objection.[67] The appeal was dismissed, as was his petition for a more lenient sentence.

H) J. SCOTT BENNING

J. Scott Benning was called before the Commission on 23 March 1946. He immediately expressed his grave reservations about the proceedings and was concerned that the secrecy oath would allow the prosecution to charge him but would prevent him from contradicting anything until he had permission. Kellock assured him that he had permission to speak to his legal representative. Benning's anger must have been obvious. Kellock asked him, "...What is troubling you?" Benning responded: "Well, I think it should be rather obvious. Five weeks plus two days [held in custody] and the abrogation of all civil rights." Kellock answered, "We are not

[66] *R*. v. *Smith,* [1947] 3 D.L.R. 798, 4 C.R. 98 at para. 17.
[67] *Ibid*., at para. 13.

going to discuss anything of that kind."[68] After hearing the testimony Benning gave, the Royal Commission accused Benning, in their report, of providing about seventy separate documents relating to ammunition supply, including reports on the North American Co-ordinating Committee of the Joint Gun Ammunition Production Committee.[69]

A jury convicted Benning on 29 October 1946 for communicating information to a foreign power prejudicial to the safety or interest of Canada. He appealed and Robertson C.J.O allowed the appeal. Benning was not charged with conspiracy under s. 573 of the *Criminal Code*[70] unlike many of his co-conspirators who had recently appealed. The court held that it was entirely likely that he came into contact with agents of a foreign power; he had met Fred Rose socially and his wife's sister was Gerson's wife and thereby contravened the *Official Secrets Act* in regards to communicating with an agent of a foreign power.

However, as Robertson C.J.O. found, "There is nothing inherently wrong or harmful in having been in communication with the agent of a foreign power, nor is it an offence under the statute."[71] Something more would be required for conviction and, if mere communication with a foreign agent was an offence, Parliament would have expressed this. Nor did Parliament, in the view of the Court, intend to shift the burden of proving innocence on the accused based solely on the fact that the accused had communicated with a foreign agent. This would have been contrary to the presumption of innocence doctrine. The accused must do an identifiable act at an identifiable time or place. The Crown was not able to show that he was in communication with anyone. The appeal was allowed and the conviction squashed for want of evidence.[72]

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[68]Testimony of J. Scott Benning, Bothwell & Granatstein, *supra* note 2 at 323.
[69]*Royal Commission on Espionage, supra* note 6 at 709-710.
[70]R.S.C. 1927, c. 36
[71]*R.* v. *Benning* [1947] 3 D.L.R. 908, 4 C.R. 39, 89 C.C.C. 33, at para. 18.
[72]*Ibid*. at para. 19-20

I) FRED ROSE

Fred Rose, M.P. was called before the Commission on 26 April 1946. Three solicitors represented him: Messrs. Cohen, Finer and Hill. Cohen argued that Rose was protected by Parliamentary immunity and therefore could not be compelled to testify while the House of Commons was in session and for forty days before and forty days after. They asserted the right not to be compelled to disclose the nature of his defence before he was able to make that defence as he had already been charged. Rose's solicitors recommended that Rose not agree to be sworn. After a short recess, Taschereau reported to Rose and his solicitors:

> As you know, this investigation has been going on for a number of weeks, and the evidence shows that Mr. Rose has been guilty of misconduct in connection with the subject-matter which we have been investigating. We wanted to give Mr. Rose an opportunity to come here and answer to those charges; but in view of the attitude which he now takes, and in view of the fact that he as refused this opportunity, we feel free to report to the Governor General as we deem fit.[73]

The witnesses withdrew and the Commission adjourned.

Rose was later convicted for conspiracy to commit offences prohibited by the *Official Secrets Act*. He was sentenced to six years in jail. Counsel for Rose appealed to the Quebec Court of King's Bench, Appeal Side on a great number of technical issues, which were dismissed relating to the offence of conspiracy. Lunan's refusal to testify at Rose's trial as a co-conspirator did not affect Rose's right to cross-examination. The court upheld the right of the Crown to use diplomatic papers against Rose; they were not protected by diplomatic immunity since Rose is not a diplomat but a Canadian citizen. Gouzenko did not claim diplomatic immunity nor did the USSR and, regardless, had been seized by the government of Canada.[74]

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[73]Testimony of Fred Rose, Bothwell & Granatstein, *supra* note 2 at 340.

[74]*R*. v. *Rose* [1947] 3 D.L.R. 618, 88 C.C.C. 114, 3 C.R. 277. However, in *R. v. Harris,* the Ontario Court of Appeal noted that the Gouzenko documents might have indicated that certain acts had been done by the accused but no witness had been called to establish the truth of the statements in the documents. Therefore, they were considered hearsay. The bald statements in the documents did not constitute proof that the accused had, in fact, breached the *Official Secrets Act*. The trial judge had erred in relying on the documents and drawing inferences from them. *R. v. Harris*, 1947 CarswellOnt 24 (Ont. C.A.) at para. 11.

This view was attacked in the *University of Chicago Law Review*. The Court had held that the executive determined the question of immunity and the *Review* called it the "finders-keepers test."[75] According to international law, a diplomat cannot waive this privilege. Documents do not become immune solely by being on Embassy soil and loss of immunity cannot be attributed to their removal. It was a "disturbing precedent."[76]

J) HALPERIN, SHUGAR, AND WILLSHER

Kathleen Willsher made no excuses. She did not hide that she had transmitted some of the secret information to the Soviets in her job as assistant registrar at the British High Commission in Ottawa. She had became a communist member in 1936 yet she testified that she thought the information she was passing was for the use of the Canadian party only. That it passed to Russia was a "great misfortune." Gerald Fauteux, counsel for the Commission, asked her, "You were ready do anything the Party asked you to?" Her response: "Yes."[77]

David Shugar refused to cooperate and, as a result, the Crown could not build a case against him. Shugar immediately asserted his right to not answer questions on the advice of his legal counsel when he appeared before the Commission on 8 March 1946. He challenged the Commissioners and it appears that the exchange became heated. Shugar claimed that questions asked did not pertain to the inquiry. The Commissioners asserted that they alone determined this. Kellock, appearing to lose his detachment, lashed out at Shugar: "You must not waste our time. We will not have our time wasted. You are either going to answer the questions or you are not..." Shugar refused to answer. He was threatened with contempt. The Commission recessed;

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[75]"The Canadian Spy Case: Admissibility in Evidence of Stolen Embassy Documents" (1948) 15 U. Chi. L. Rev. 404 at 406.
[76]*Ibid*., at 409.
[77]Testimony of Kathleen Willsher, Bothwell & Granatstein, *supra* note 2 at 168-186.

the next day Shugar answered some questions.[78] At the preliminary hearing, the magistrate held that there was not even a *prima facia* case and so Shugar was discharged[79] despite the Royal Commission's accusation that he had revealed information on anti-submarine detection.[80]

Isreal Halperin, when called before the Commission on 22 March 1946, cut off Kellock as he was administering the oath and demanded to know who they were. He then asserted he had been denied access to legal counsel. Kellock would not consider the matter until he had been sworn. Halperin said, "I am here against my will," and Kellock responded, "Of course you are." The transcripts then detail a series of questions Halperin directed to the Commissioners dealing with their powers, contempt of court, and the possibility of physical compulsion, which demonstrated his fear since he had been held by the R.C.M.P for five weeks. He refused to be sworn until his counsel, Senator A. W. Roebuck, could attend the meeting.

The Commission recessed until 27 March 1946. Finally, Halperin agreed to be sworn. He then refused to go on with the inquiry. He claimed the evidence presented was rubbish and that he did not know Lunan. The questioning continued and Halperin retracted his oath. Taschereau asserted that it could not be retracted. Halperin refused to cooperated and ended with, "I will give no further statement; beyond the statement I now make, I will not open my mouth here again."[81] In their report, the Royal Commission accused Halperin of transmitting information relating to the Canadian Army Research and Development Establishment including the locations of the Pilot Explosive Plant, the Ballistics Laboratory, the Design Branch and the Field Trials Wing.[82]

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[78]Testimony of David Shugar, Bothwell & Granatstein, *supra* note 2 at 273-274

[79]M. H. Fyfe, "Some Legal Aspects of the Report of the Royal Commission on Espionage" (1948) 24 Can. Bar. Rev. 777 at 784.

[80]*Royal Commission on Espionage, supra* note 6 at 701.

[81]Testimony of Israel Halperin, Bothwell & Granatstein, *supra* note 2 at 312-321.

[82]*Royal Commission on Espionage, supra* note 6 at 707.

K) SUMMARY

In the end, Scott Benning, Raymond Boyer, H. S. Gerson, Gordon Lunan, Edward Mazerall, Durnford Smith, Kathleen Willsher, Emma Woikin, and Fred Rose were convicted. Eric Adams, Israel Halperin, Fred Poland, and David Shugar were acquitted. Eric Adams was acquitted on a technicality, while others, like David Shugar had their case dismissed for want of evidence.

5. THE COMMISSIONERS

Regardless of the outcome and the ultimate guilt or innocence of the accused spies, troubling aspects, relating to fairness and justice, linger for a number of reasons including the refusal of the Commissioners to allow legal counsel for the witnesses, the neglect in informing witnesses that their testimony may be used against them until after the fact, and failing to inform them that they had the right to not have their testimony used against them. To compound these concerns, there is an appearance of bias on the part of the Commissioners.

In this case, the accused witnesses, after having been seized and placed in isolation for weeks, were taken before the Commission against their will. Legal counsel was not offered and, when witnesses asked for counsel, the Commission routinely resisted. The rationale for depriving this right is, at best, unclear and certainly inconsistent. The *Inquiries Act* authorised the Commissioners to allow legal counsel for any person being investigated but required legal counsel for any person who faced charges made in the course of the Commission's inquiry.[83] Having been taken before the Commission, and being required to testify, the accused witnesses were only afterwards informed that they faced the potential of charges and offered legal counsel but, surely, the Commissioners knew full well that charges were likely?

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[83] *Inquires Act, supra,* note 20 at s. 12.

As a result of being denied legal counsel, some of the witnesses failed to assert their right against self-incrimination, which they must do, even while required to testify, in order to prevent the testimony being used against them in subsequent proceedings. While the burden of assertion rests with witnesses, it is one that not every layperson can be expected to know and demonstrates the need for legal counsel. Rather then inform the witnesses of this critical right, in lieu of legal counsel, the Commissioners insisted they testify and often threatened contempt if they hesitated. Kellock and Taschereau repeatedly refused to take any responsibility for the treatment of these witnesses and when witnesses, who were not represented by counsel, requested advice on their legal rights, the Commissioners obfuscated. The Commissioners adopted many practices contrary to strict court proceedings, such as the admission of hearsay and secondary evidence, so it is quite odd that they would be so strict in relation to advising witnesses not familiar with how the law imposes this burden.[84]

The Commissioner's position on the legal rights of the accused witnesses may have been, strictly speaking, accurate, given a narrow interpretation of the *Inquiries Act*, but it certainly was not fair. The ancient right of natural justice,[85] as exemplified in the legal maxim *nemo judex in causa sua debet esse,* requires that a decision-maker make a decision untainted by bias: "I need not add that...[a court] must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything."[86] In its modern incarnation, the courts look to see if a reasonable person conversant with the facts would consider that the decision maker was biased. Factors could include antagonism towards one of the parties or an attitude suggesting that the decision-maker was interested in a particular outcome.[87] When these witnesses did take the

[84]Fyfe, *supra* note 79 at 781.
[85]See, for instance, *Dr. Bonham's Case* (1610), 8 Co. Rep. 113b, 77 E.R. 646.
[86]*Board of Education* v. *Rice*, [1911] A.C. 179 at 182 (H.L.)
[87]The Supreme Court ruled on the question of bias in *Re Energy Probe and Atomic Energy Control Board* (1984), 8 D.L.R. (4th) 735 (F.C. T.D.), aff'd (1984), 15 D.L.R. (4th) 48 (F.C.A.).

stand, they were often badgered by the Commission's lawyers, and by the Commissioners themselves, who dropped even the pretext of impartiality. Compound this with their open antagonism towards some of the witnesses, and their strong interest in securing convictions against these individuals in the interest of national security, and a reasonable apprehension of bias can be demonstrated.

Kellock and Taschereau were obviously aware that their actions, in retrospect, could engender criticism for they included an unusual section in their report entitled "Law and Procedure," which has been called "the apologia of the Commissioners for adopting extraordinary procedures..."[88] In it, the Commissioners take the unusual step of defending their actions and their accusations and explained why the harsh treatment of the witnesses was necessary even while claiming to have no control over it. They asserted that Lunan, for instance, only became mute when he had an "opportunity of discussing matters with others and of receiving instructions from others..."[89]

Fundamentally, the great problem with the Royal Commission, and the Commissioner's treatment of their witnesses, is the appearace of injustice for, as a learned law lord once observed, "...it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[90] Justice should not be "a cloistered virtue."[91] Those called before the Commission and subsequently found guilty may well have been guilty, justice may have been done, but at what cost? The problem is that, once the veil of secrecy fell, it *appears* that justice was certainly not done.

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[88]Fyfe, *supra* note 79 at 777.
[89]*Royal Commission on Espionage, supra* note 6 at 667.
[90]*R*. v. *Sussex Justices ex parte McCarthy*, [1924] 1 K.B. 256 at *259.*
[91]*Ambard* v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 at 335 (P.C.).

6. IMPLICATIONS FOR TODAY

In the mid 1940s, there was little that could be done from a constitutional perspective to prevent miscarriages of justice. Civil rights were only protected by the long traditions of democracy and a judicial understanding that a statute that removed a civil liberty was subject to a strict construction. Any invasion of personal rights had to be clearly authorised by the statute since the court could not provide few other protection.[92] The only constitutional tool available was the use of federal-provincial division of powers, as weak as it was, to protect some basic civil rights.[93] But the *War Measures Act,* which authorised the various orders-in-council underpinning the Royal Commission is no more, having been replaced by the *Emergencies Act,*[94] which is, itself subject to the *Charter of Rights and Freedoms.*[95] So too is the *Evidence Act*. In so many ways, the Canadian legal landscape has been transformed since the 1940s so it is reasonable to ask if the abuses of the Royal Commission, and the subsequent spy trials, could happen again? Can we consign this sad story to the dustbin of history? The answer is no.

In recent years, much has been made of the *Anti-Terrorism Act,*[96] which was passed by Parliament in the wake of the terrorist attacks in New York, despite much protest over its sweeping measures. Some of the worst examples in the statute, that repeat the mistakes of the Royal Commission on Espionage, included the powers of preventative arrest which allows a person to be arrested and detained before charges are laid and the power to hold investigative

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[92]Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 2000) at 626-630. Certain British constitutional documents such as the *Magna Carta*, *1297* (U.K), 25 Edw. 1, c. 9 and the *Bill of Rights, 1688* (U.K.), 1 Will. & Mary, c.2 provided some basic rights and were applicable in Canada pursuant to the doctrine of reception.

[93] In *Union Colliery Co.* v. *Bryden,* the Privy Council declared prohibitions against Chinese men working in mines to be *ultra vires* of the government of British Columbia. The Supreme Court also used the division of powers to uphold freedom of the press in *Reference Re Alberta Statutes*, [1938] S.C.R. 100 (S.C.C.).

[94]R.S.C. 1985, c. 22 (4th Supp.).

[95]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[96]*An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act, and other Acts, and to Enact Measures respecting the Registration of Charities, in Order to Combat Terrorism*, S.C. 2001, c. 41.

hearings that forced individuals to appear before a judge to give evidence; they could be arrested for failing to appear. Those appearing before such hearings do have the right to counsel but cannot refuse to answer questions.

However, the investigative hearing section of the statute, for example, provided important procedural protections:

> No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but
>
> (a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and
>
> (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.[97]

By providing these use and derivative-use immunities, the Supreme Court of Canada held that investigative hearings were constitutionally valid subject to a reading in that "criminal proceedings" include extradition and deportation proceedings. A *Charter* section 1 analysis was not necessary.[98]

These sweeping powers are, in fact, more delimited than existing powers under the *Evidence Act*. As the majority noted in *Re Application under s. 83.28 of the* Criminal Code:

> It is clear...that the procedural protections available to the appellant in relation to the judicial investigative hearing are equal to and, in the case of derivative use immunity, greater than the protections afforded to witnesses compelled to testify in other proceedings, such as criminal trials, preliminary inquiries or commission hearings.[99]

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[97] *Anti-Terrorism Act*, supra note 96 at s. 83.28(10).
[98] *Application under s. 83.28 of the* Criminal Code *(Re),* 2004 SCC 42 (S.C.C.) at para. 4.
[99] *Ibid.,* at para. 73. The power to establish investigative hearings was subject to a so-called "sunset clause" and lapsed on March 1, 2007 when a motion to preserve it failed 159-124 in the House of Commons on February 27,

The *Canada Evidence Act* and the almost equivalent provision in the *Ontario Evidence Act* still require a witness to assert the right to not have the testimony used against them, although it is subject to the *Charter's* s. 13, which protects everyone against self-incrimination. The Supreme Court of Canada considered how the *Evidence Act* interacts with s. 13 in *R. v. Noël.* Arbour J, for the majority noted:

> I have come to the conclusion that s. 13 of the *Charter* must be interpreted as follows: When an accused testifies at trial, he cannot be cross-examined on the basis of a prior testimony unless the trial judge is satisfied that there is no realistic danger that his prior testimony could be used to incriminate him. The danger of incrimination will vary with the nature of the prior evidence and the circumstances of the case including the efficacy of an adequate instruction to the jury. When, as here, the prior evidence was highly incriminating, no limiting instruction to the jury could overcome the danger of incrimination and the cross-examination should not be permitted.[100]

But, this all depends, ultimately, on the enforcement of *Charter* principles, which, as discussed above, rely on judges resisting demagoguery and public demands. In circumstances such as war, the courts give Parliament significant deference due to Parliament's sweeping emergency powers[101], which would normally be unconstitutional.[102] As one commentator described, during World War II, "...the Canadian courts were helpless to aid in the maintenance of even minimal civil liberty guarantees."[103] Furthermore, the federal government's wartime powers have never been tested against the *Charter* but, as jurisprudence has shown, one part of

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2007. However, on October 27, 2007, the government introduced Bill S-3, where it received third reading on March 6, 2008. It received first reading in the House of Commons but has died on the order papers.

[100] *R. v. Noël*, 2002 SCC 67 (S.C.C.) at para. 4.

[101] Parliament has the power "to make laws for the peace, order, and good government of Canada..." *Constitution Act, 1867 (U.K.*), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. at s. 91.

[102] In *Fort Frances Pulp and Power Co.* v. *Man. Free Press Co.,* [1923] A.C. 695 at 705, the Privy Council held that federal price controls, normally a provincial power, were valid "in a sufficiently great emergency such as that arising out of war." See also *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 191.

[103] Herbert Marx, "The Emergency Power and Civil Liberties in Canada" (1970) 16 McGill L.J. 39 at 91.

the *Constitution* cannot trump another.[104] Wilson J of the Supreme Court of Canada noted: "It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the *Constitution*..." [105] Thus, it is certainly foreseeable that, in national security contexts, *Charter* breaches would be immunised by the federal government's equally valid emergency powers. It is important to remember that the Americans, armed with the great protections of their *Bill of Rights*,[106] still violated civil human rights during World War II and justified the internment of the Japanese just as the Canadian government did. Constitutional rights are not always a shield.[107]

6. CONCLUSION

History, "teaches us the mistakes we are going to make"[108] and we forget the lessons of history at our peril. In times of war, in times of crisis, history teaches us that we have been all too willing to unnecessarily sacrifice liberty at the alter of national security. In the heat of the moment, Parliament responds to the public's demands for sweeping measures and, as a result, they overestimate the need to restrict civil rights. As one historian has observed:

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[104] The use of the emergency power has never been constitutionally scrutinised by the courts after its use in the FLQ crisis. See Hogg, supra note 92 at 440.

[105] *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, 1987 CanLII 65 (S.C.C.) at para. 62. See also *Adler v. Ontario*, 1996 CanLII 148 (S.C.C.) and *O'Donohue v. Canada*, 2003 CanLII 41404 (ON S.C.) where the Court held that the *Act of Settlement, 1701,* a constitutional document that prohibits Roman Catholics from assuming the throne, was not invalided by the *Charter's* religious freedom guarantee.

[106] U.S. Const. amends. 1-10.

[107] See *Co-operative Committee on Japanese Canadians* v. *Canada (A.G.)*, [1947] A.C. 87 (P.C.). The Privy Council held that the Federal government could deport Japanese persons who were British subjects pursuant to its emergency power. The Supreme Court of the United States, while acknowledging that distinctions between citizens based on ancestry was "odious", nevertheless upheld curfew and mobility regulations directed at Japanese Americans. See *Hirabayashi v. United States*, 320 U.S. 81 (1943). The subsequent challenge of the exclusion of people of Japanese descent from the West Coast of the United States was upheld by the Supreme Court of the United States in *Korematsu v. United States*, 323 U.S. 214 (1944). It was acceptable to exclude all persons of Japanese descent because there was an unknown element of disloyal persons and it was impossible to separate the disloyal from the loyal. Therefore, all would suffer despite the guarantees of the *Bill of Rights*. An earlier, dreadful, example is the infamous Dred Scott case, where the US Supreme Court held that black men were not "all men" within the meaning of the US Declaration of Independence: *Scott v. Sandford*, 60 US (19 How) 393 (1857).

[108] Lawrence J. Peters qtd. in "Social Studies", *Globe and Mail* 16 February 2005 at A18.

> [There is a] Canadian tendency to indulge in drastic security legislation in times of crisis, real or apprehended, without much concern for civil liberties... In times of convulsion, real or apprehended, many a statute, bringing excess in its train, has been enacted through ignorance, fear, the 'impetuosity of rage' and/or a striking deference to governmental authority.[109]

This was true for the adoption of the *War Measures Act* during both world wars, the creation of the Royal Commission on Espionage and now, in the aftermath of the 9/11 tragedy, with the *Anti-Terrorism Act.* Even the vaunted *Charter* is no guarantee of protection.

Obviously, the nation must protect itself and, sometimes, individual rights are violated. While it is tempting to reiterate Lord Mansfield's famous declaration: "*fiat justicia ruat coelum*,"[110] an equilibrium must be found for what John Stuart Mill called, "The struggle between Liberty and Authority..."[111] It was, fundamentally, a question of balance – a balance that, in this case, was critically askew in the race, driven by fear, to protect national security. After all, fear can make us do awful things but it is a true test of who we are, when, in our darkest hour, we uphold the values and principles we cherish.

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[109]F. Murray Greenwood, "The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the need for Vigilance" (Canadian Law in History Conference, Carleton University, 8-10 June 1987) [unpublished] at 267 & 263.

[110]Translated as "Let justice be done though the heavens may fall." *R. v. Knowles, ex parte Somersett* (1772), 20 State Tr. 1.

[111]John Stuart Mill, *On Liberty and Other Essays*, (Oxford: Oxford University Press, 1991) at 5.